THE "CONSENSUS PLAN" SPECTRUM GRANT PROPOSAL VIOLATES WELL-ESTABLISHED LICENSING POLICY AND QUALIFIES NEITHER AS A "CHANNEL SWAP" NOR AS A "LICENSE MODIFICATION"

A crucial element of the so-called "Consensus Plan" is its proposal that the Commission bypass its normal competitive bidding procedures and grant to Nextel Communications Inc. an exclusive nationwide license covering 10 MHz of spectrum in the 1.9 GHz band (1910-1915/1990-1995 MHz). Although the Commission's proceeding is aimed at eliminating the problem of interference to public safety radio systems in the 800 MHz band, proponents of the "Consensus Plan" claim that this exclusive assignment of 1.9 GHz spectrum to Nextel is needed to allow Nextel to "be made whole" for relinquishing spectrum in the 700, 800 and 900 MHz bands.[1] They also argue that this spectrum grant can be justified legally either as a "channel swap" or as a "license modification."[2] As shown below, however, this aspect of the "Consensus Plan" would significantly depart from Commission precedent and is unsupported in law or policy. In particular, it would:

- violate the well-established policies underlying Section 309(j) of the Communications Act and would circumvent the Commission's standard license assignment process;
- not qualify under the applicable law as either a channel swap or a license modification; and
- require the Commission either to improperly ignore its statutory obligations or to illegally use its Section 316 authority to "trump" its Section 309(j) obligations.

The "Consensus Plan" proposal would sidestep the normal competitive bidding rules and procedures in order to substantially improve Nextel's spectrum holdings without Nextel having to face competition for the licenses. The Commission should not allow its public safety interference proceeding to be used in this way.

I. Giving Away 10 MHz of Spectrum in the 1.9 GHz Band Would Violate the Policies Underlying the Auction Statute and Deviate from Standard Commission Practice.

Congress amended the Communications Act in 1993 to authorize that the Commission use competitive bidding to award licenses for commercial services.[3] In 1997, the Act was strengthened to require auctions whenever mutually exclusive applications for the same spectrum are filed.[4] Only very limited exceptions to this policy exist for public safety and satellite services, and certain broadcast licenses,[5] and this is for good reason.

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[1] *See* Reply Comments of the Consensus Parties, WT Docket No. 02-55, August 7, 2002, at p. 18.

[2] *See* Reply Comments of Nextel Communications Inc., WT Docket No. 02-55, August 7, 2002, at pp. 61-68. It is particularly galling that, as a vehicle to enhance its spectrum holdings, Nextel is using the Commission's effort to solve the problem of interference to public safety radio systems – a problem caused primarily by Nextel's own operations.

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993) (adding Section 309(j) to the Communications Act).

[4] *See* Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997).

[5] *See* 47 U.S.C. § 309(j)(2); *see also* 47 U.S.C. § 765.

Since the enactment of Section 309(j) in 1993, the Commission has codified general auction rules in Subpart Q of Part 1 of its rules, and has successfully used competitive bidding to award spectrum licenses for terrestrial commercial uses, adhering faithfully to the bedrock principle of auction policy – that awarding licenses to those who value them most highly will encourage growth and competition, result in the rapid deployment of new technologies and services, and promote efficient spectrum use.[6] Time and again, the Commission has allocated spectrum for new wireless services, adopted service and licensing rules that include specification of the size of the geographic areas to be licensed and the rules to govern competitive bidding, and then proceeded to auction.

The standard licensing assignment process is already underway with respect to the 10 MHz of spectrum coveted by Nextel. Recognizing that the demand for spectrum for advanced wireless services exceeds the currently available supply, the Commission has reallocated some spectrum to fixed and mobile uses from other uses and has proposed other similar reallocations. The 1990-1995 MHz band already has been reallocated for advanced wireless services, and the Commission has initiated a rule making proceeding to determine whether the 5 MHz block at 1910-1915 MHz (now designated for unlicensed PCS) should be re-designated for new advanced wireless services.[7]

The "Consensus Plan" proposes that the Commission deviate from its standard license assignment process and give Nextel – without any competitive process whatsoever – an exclusive nationwide license to operate on 10 MHz of prime commercial wireless spectrum immediately adjacent to the C Block PCS band. There is, however, no reason for the Commission to make this exception to its standard procedures. The record makes clear that, instead of making Nextel "whole," the requested assignment would constitute a multibillion dollar benefit for Nextel.[8]

Equally important, the proposed spectrum grant to Nextel would be inconsistent with policies that have served our nation well. As Chairman Michael Powell recently pointed out to Congress in opposing another company's attempt to secure legislation that would enable it to avoid the Commission's usual competitive bidding processes:

> [I]ssuing a license for free deprives the taxpayers of the revenue they would receive if auctioned instead. Congress's determination that an auction is the best licensing method not only to ensure that the public receives maximum value of the spectrum, but also to decide which party would put the spectrum to its best use, has proven correct.

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[6] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994), at ¶ 5.

[7] *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, *Third Report and Order, Third Notice of Proposed Rule Making and Second Memorandum Opinion and Order*, 18 FCC Rcd 2223 (2003) ("*MSS-AWS Order and NPRM*").

[8] *See* discussion at Section II below.

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> If signed and passed into law, [the proposed legislation] would curtail the Commission's ability to utilize the [competitive bidding] licensing scheme. Instead of securing the maximum value of this spectrum for the American public, Congress would potentially hand over this valuable public resource in what could amount to a potential multimillion-dollar government-created giveaway. Moreover, it would be a course that is facially and wholly inconsistent with the wireless communications policy that has governed the last decade of unprecedented wireless growth, innovation, and competition for consumers.[9]

U.S. Senate Energy and Commerce Committee Chairman John McCain, who similarly has opposed attempts to circumvent the auction process, was recently quoted as saying that giving away spectrum without an auction represents "a clear violation of administration and congressional policy."[10] The views expressed by Senator McCain and Chairman Powell apply with at least equal force to Nextel and the "Consensus Plan" proposal.

Because it calls for a deviation from the clear, well-established, and successful spectrum assignment policies under which the Commission has operated for the past decade, the "Consensus Plan's" proposal for a 10 MHz spectrum grant to Nextel should be rejected.

II. The Exchange Proposed in the "Consensus Plan" Is Not a "Channel Swap" Under FCC Precedent.

An examination of the relevant FCC precedent on channel swaps shows that the 1.9 GHz license assignment proposed in the "Consensus Plan" does not qualify. If adopted, the "Consensus Plan's" proposed exchange of spectrum would substantially upgrade Nextel's spectrum holdings.

The Standards on Channel Swaps. The relevant channel swap precedent grew out of the broadcast services, and was driven by policies that were unique to those services. First, the Commission allowed licensees of commercial broadcast channels and licensees of reserved noncommercial educational broadcast channels within the same band and serving substantially the same market to jointly petition for an amendment to the table of assignments exchanging those channels.[11] The Commission's objective in allowing these swaps was to enable noncommercial educational licensees to "receive consideration for such exchanges that permit them to improve the quality of their facilities or even, in marginal cases, to initiate broadcast operations where it would otherwise not be possible."[12] Second, the Commission permitted FM

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[9] Letter from FCC Chairman Michael K. Powell to The Honorable Frank R. Wolf, Chairman, Subcommittee on Commerce, Justice, State and the Judiciary, Committee on Appropriations, U.S. House of Representatives, dated October 7, 2003 (opposing proposed legislation that would prohibit the Commission from utilizing competitive bidding to assign licenses for the Multichannel Video Distribution and Data Service in the 12 GHz band).

[10] "Cable Rival is Small but Has Friends," by Juliet Eilperin, *The Washington Post* (October 8, 2003).

[11] *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, MM Docket No. 85-41, *Report and* Order, 59 RR 2d 1455 (1986) ("*Channel Exchange Order*"), *recon. denied*, 3 FCC Rcd 2517 (1988), *aff'd Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) ("*Rainbow Broadcasting*").

[12] *Channel Exchange Order* at ¶ 19.

radio licensees to upgrade their facilities to higher-class channels in certain circumstances without being subjected to competing applications.[13] There, the Commission's primary objectives were encouraging FM operators to provide expanded service to the public and providing both a more economical use of Commission resources and more efficient use of the broadcast spectrum.[14]

In both situations, the Commission rejected arguments that its action would be inconsistent with its obligations under Section 309 and the U.S. Supreme Court's ruling in *Ashbacker Radio Corp. v. FCC*.[15] In the context of commercial/non-commercial channel swaps, the Commission determined that allowing these swaps did not run afoul of *Ashbacker* because both channels involved in the exchange were already occupied and were not available for new licensing:

> the channels proposed to be exchanged here between noncommercial educational and commercial television stations are not [as in *Ashbacker*] available, as they are already occupied by the petitioning licensees. Opening such channels to applications by third parties, while theoretically possible, would not be viable, as experience has shown that neither of the potential exchange partners would likely pursue an exchange agreement in the face of a comparative hearing.[16]

Though it allowed commercial/non-commercial channel swaps to proceed, the Commission imposed certain limitations. For example, the proceeds received by noncommercial television stations participating in channel exchanges were required to be used for "purposes related to the operations of the noncommercial licensee" and the policy would not apply where licensees sought to use channel exchange agreements to substantially change their coverage areas.[17] In *Rainbow Broadcasting*, the court found the Commission's channel exchange policy to be a proper exercise of the Commission's authority. As the court put it, the policy was reasonably designed "to promote educational television by making it easier for educational channels to raise cash by trading in on their valuable channel positions."[18]

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[13] *See Amendment of the Commission's Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent Channels*, MM Docket No. 85-313, *Report and Order*, 60 RR 2d 114 (1986).

[14] *Id*. at ¶ 3.

[15] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

[16] *Channel Exchange Order* at ¶ 26.

[17] *Id*. at ¶¶ 31, 32.

[18] *Rainbow Broadcasting*, *supra note 11*, at p. 410. The Commission has continued to allow two licensed broadcast stations to exchange licensed frequencies in order to achieve some other public interest benefit. *See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations and Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Buffalo, New York)*, 14 FCC Rcd 11856 (1999), *review denied*, 16 FCC Rcd 4013 (2000); *WQED Pittsburgh (Assignor) and Cornerstone Television, Inc. (Assignee)*, FCC 99-393, 19 CR 214 (1999).

In the context of FM channel upgrades, the Commission allowed licensees to swap a lower class channel allotment for an allotment that allowed higher power operations, and distinguished that situation from *Ashbacker*. The Commission stated:

> [W]e do not believe that *Ashbacker* . . . is controlling here. . . . In that case, the applicants sought to operate on a frequency that was generally available for application. In contrast, the newly allotted adjacent or co-channels requested by stations seeking to upgrade are not similarly available. Here, the affected frequencies are already precluded by existing operations.

The "Consensus Plan" Does Not Qualify As A "Swap". The proposed spectrum assignment to Nextel in the "Consensus Plan" is unlike either of the channel swap scenarios allowed by the Commission. The Commission seems to be aware of this distinction, as it recognized in the *Notice of Proposed Rule Making* in the public safety interference proceeding that the *Ashbacker* ruling does not apply in true channel exchange cases "because the channels are occupied rather than 'open.'"[19] The channel swap case law cannot be applied to Nextel's effort to secure the exclusive use of the 1910-1915/1990-1995 MHz bands because this spectrum is as "open" as spectrum can be.[20]

The "Consensus Plan" Amounts To a Substantial and Unjustifiable Upgrade for Nextel. In the decision upheld in *Rainbow Broadcasting*, the Commission specifically limited the channel exchange policy to situations in which a licensee was not seeking to use the swap process to substantially change its coverage area. In contrast to that concept, the "Consensus Plan" proposes a nationwide assignment of 10 MHz of contiguous, comparatively clear spectrum to Nextel in exchange for relinquishment of a patchwork of frequencies that have limited utility. The channel swap precedent cannot be stretched to encompass the substantial upgrade proposed in the "Consensus Plan." Neither *Rainbow Broadcasting* nor any case in which the Commission has approved a spectrum swap involved a spectrum upgrade of the type or magnitude suggested here.

Grant of a nationwide 10 MHz license to Nextel would not, as Nextel claims, "make it whole." Instead, Nextel's spectrum holdings would be substantially upgraded under the "Consensus Plan." Nextel currently is licensed to operate Specialized Mobile Radio ("SMR") systems in the 800 MHz and 900 MHz bands, and as a band manager on 700 MHz guard band spectrum. Under the "Consensus Plan," Nextel would return its 700 MHz and 900 MHz spectrum entirely, along with some of its 800 MHz spectrum, in return for a nationwide license on 10 MHz of spectrum in the 1.9 GHz band. Nextel argues that this is a fair "swap" that will make it whole. This is simply false. When the characteristics of the spectrum to be returned are compared with those of the spectrum to be gained by Nextel, it is clear that Nextel will benefit

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[19] *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Notice of Proposed Rule Making*, FCC 02-81 (rel. March 15, 2002) at ¶ 80, *citing Amendment of Section 73.606(b), Table of Allotments. Television Broadcast Stations*, MM Docket No. 98-175, *Report and Order*, 14 FCC Rcd 11856 (1999), at ¶ 12.

[20] The Commission has solicited comment on reallocating the 1910-1915 MHz band, which is presently allocated for asynchronous unlicensed PCS operations but is not substantially used, so that it can be used for advanced terrestrial wireless services. The 1990-1995 MHz band was recently reallocated from satellite to terrestrial use for the same reason. *See MSS-AWS Order and NPRM*, *supra note 7*.

substantially from the public safety proceeding by upgrading its spectrum holdings to allow it to compete more effectively in the commercial wireless market.

The "Consensus Plan" would have the Commission assign to Nextel on a nationwide basis two 5 MHz blocks of paired, contiguous spectrum immediately adjacent to the PCS band.[21] Each of the spectrum holdings that would be returned by Nextel under the "Consensus Plan," however, is vastly inferior to the 1.9 GHz spectrum that would be assigned to Nextel under the plan:

- Nextel's 700 MHz Spectrum. Nextel holds numerous licenses for 4 MHz of spectrum in the so-called Upper 700 MHz Guard Band,[22] all of which it offers to return to the Commission under the "Consensus Plan." The usefulness of this spectrum for commercial wireless service is severely limited by three major factors.

    - Incumbent broadcasters now occupying this band have the right to continue operating until at least December 31, 2006, making it unusable in many areas of the country.
    - The Commission's rules prohibit the use of cellular-type network architectures and subject licensees in this band to strict out-of-band-emissions limits and frequency coordination procedures.
    - Licensees in this band must lease a majority of their licensed spectrum to unaffiliated entities.

  The 1.9 GHz spectrum which Nextel wants assigned to it suffers from none of these handicaps.

- Nextel's 800 MHz Spectrum. The 800 MHz band (occupying 36 MHz of spectrum from 806-824/851-869 MHz) is basically divided into four general channel blocks: the General Category channels (7.5 MHz at 806-809.75/851-854.75 MHz); the Interleaved channels (12.5 MHz at 809.75-816/854.75-861 MHz); the Upper 200 Channels (10 MHz at 816-821/861-866 MHz); and the NPSPAC channels (6 MHz at 821-824/866-869 MHz). Boiled down to its essential components, the "Consensus Plan" would reconfigure the 800 MHz band so that public safety and private land mobile licensees would occupy the lower 20 MHz of the reconfigured band, with digital SMR operations occupying the upper 16 MHz. Nextel would retain all of the contiguous and essentially nationwide 10 MHz of spectrum it now holds in the Upper 200 Channel block, and shift its operations from the General Category and Interleaved channels to other Nextel spectrum. Nextel claims that it would relinquish a "running average" of approximately 2.5 MHz of the spectrum it now holds in the General Category and Interleaved channels.

  The spectrum in the 800 MHz General Category and Interleaved channels with which Nextel is offering to part is far inferior to the proposed 1.9 GHz spectrum that Nextel seeks. First and foremost, unlike the proposed assignment of 1.9 GHz spectrum,

[21] There are Broadcast Auxiliary Service licensees in the 1990-1995 MHz band that would have to be cleared.

[22] This band was auctioned exclusively to "guard band managers," a new class of commercial licensees engaged solely in the business of leasing spectrum to third parties on a for-profit basis.

Nextel holds neither contiguous nor nationwide spectrum in the 800 MHz band.[23] At least as significantly, as an auction winner who obtained geographic area licenses on these channels through competitive bidding, Nextel is required to provide co-channel protection indefinitely to the incumbent site-specific licensees present on the General Category and Interleaved channels. This requirement limits the usefulness of particular channels in particular areas. Neither of these shortcomings applies to the 1.9 GHz spectrum which Nextel wants assigned to it.

- Nextel's 900 MHz Spectrum. The "Consensus Plan" calls for Nextel's 900 MHz SMR channels to be re-designated for Business/Industrial Land Transportation ("B/ILT") and traditional SMR use by licensees relocated from the 800 MHz band. Nextel claims that it will return a "running average" of 4 MHz of 900 MHz spectrum. However, unlike the 10 MHz of 1.9 GHz spectrum it seeks be assigned, Nextel's 900 MHz spectrum is neither nationwide nor contiguous.

The iDEN® technology that Motorola developed for Nextel is a narrowband technology designed to operate in the current 800 MHz environment, where much of Nextel's spectrum is interleaved with public safety and private land mobile spectrum. Nextel plans to migrate its service features to "a next generation platform" using CDMA technology.[24] To accomplish this, Nextel needs more contiguous spectrum and is obviously trying to use the opportunity presented by the public safety interference proceeding to increase the amount of contiguous spectrum it controls.

Nextel's claim that the 700 MHz, 800 MHz and 900 MHz spectrum it proposes to return is an even exchange for a clear 10 MHz of nationwide spectrum at 1.9 GHz is simply not credible. The Commission has acknowledged the value to carriers of contiguous spectrum blocks,[25] and independent analysis bears this out. A recent appraisal by Kane Reece Associates shows that the value of Nextel's 800 MHz spectrum alone would increase by $2.3 billion as a result solely of reconfiguring that band to create more contiguous spectrum holdings.[26] If the Commission were to assign 10 MHz of paired, contiguous spectrum in the 1.9 GHz band to Nextel, the value of Nextel's spectrum holdings would increase by $7.2 billion, according to

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[23] *See* Comments of Preferred Communications, Inc., WT Docket No. 02-55, filed February 10, 2003, at 11-13 and Appendices.

[24] Statement by Tim Donohue, President and CEO of Nextel, in Press Release, *Nextel, QUALCOMM and Motorola to Expand Direct Connect Services to Third Generation CDMA Networks Worldwide*, January 10, 2002 (accessible at http://idenphones.motorola.com/iden/press_releases/ and at http://www.qualcomm.com/press/pr/news/). *See also* Nextel Communications, Inc. Annual Report (SEC Form 10-K), filed with the Securities and Exchange Commission on March 29, 2002, at 7 ("[W]e have entered into several exclusive development agreements with QUALCOMM, Inc. and Motorola to preserve and enhance the development of our unique Nextel Direct Connect service on various code division multiple access, or CDMA, platforms.")

[25] *See, e.g., Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz* Band, IB Docket No. 99-81, *Notice of Proposed Rulemaking*, 22 CR 2137 ¶ 48 (1999); *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8046 ¶ 103 (1994).

[26] *See* Kane Reece Associates, Inc., Determination of the Fair Market Value of the Certain Portions of FCC Licensed Wireless Spectrum Proposed for Realignment by Nextel Communications, Inc. Under FCC WT Docket No. 02-55 as of December 31, 2002 (Oct. 23, 2003).

Kane Reece's estimates.[27] Taking into account the money Nextel promises to pay to facilitate relocation ($700 million in present value terms), the "Consensus Plan" represents a financial benefit to Nextel of $6.5 billion. Nextel stands to gain billions from the "Consensus Plan," even if it makes the promised $850 million relocation contribution.[28]

III. The License Award Proposed in the "Consensus Plan" Cannot Be Accomplished Through "Modification" of Nextel's Licenses.

Nextel's claim that a nationwide 10 MHz assignment to it can be made through a simple license modification also does not stand up to scrutiny.

The Standards on License Modifications. Section 309(j) of the Communications Act mandates that the Commission employ competitive bidding procedures to award initial licenses where mutually exclusive applications are filed.[29] Section 316 of the Communications Act, on the other hand, authorizes the Commission to modify licenses if it determines that the public interest will be served thereby.[30] It is therefore important to clarify the legal standards that must be applied to distinguish the issuance of an initial license from the modification of an existing license.

The U.S. Court of Appeals for the D.C. Circuit has stated that "[i]n order for a license to be considered initial under Section 309(j)(1), 'a newly issued license must differ in some significant way from the license it displaces.'"[31] In *Fresno Mobile Radio*, the court agreed with the Commission's suggestion that a license should be considered "'initial' if it is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee."[32]

When it adopted rules for competitive bidding pursuant to Section 309(j), the Commission announced a standard for judging whether or not an application should be deemed a modification of an existing license and thus immune from competition:

> Where a modification would be so major as to dwarf the licensee's currently authorized facilities and the application is mutually exclusive with other major modification or initial applications, the Commission

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[27] *Id*.

[28] Even this promised $850 million relocation commitment is fraught with uncertainty. *See Ex Parte* submission, filed in WT Docket No. 02-55 on September 12, 2003 on behalf of ALLTEL Communications, AT&T Wireless, the Cellular Telecommunications & Internet Association, Cinergy Corporation, Cingular Wireless, the City of Baltimore, Maryland, Consumers Energy Company, Duke Energy, National Rural Electric Cooperative Association, Southern LINC, United States Cellular, the United Telecom Council and Verizon Wireless.

[29] 47 U.S.C. §309(j)(1).

[30] 47 U.S.C. §316(a)(1).

[31] *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000), *citing Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) ("*Fresno Mobile Radio*").

[32] *Fresno Mobile Radio*, *supra*, at 970.

> will consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding.[33]

The "Consensus Plan" does not qualify as a "modification". Nextel seeks to avoid the requirement that it compete for rights to the 1910-1915/1990-1995 MHz spectrum by claiming that the proposed assignment of that spectrum to it would not be the award of an "initial license," but instead a simple modification of its existing licenses. All the Commission need do, according to Nextel, is to specify operation on the new spectrum. This argument fails under the clear standards set both by the reviewing court and by the Commission for determining when "initial licenses" are involved.

Any licenses granted on the reallocated 1.9 GHz spectrum would meet the standard enunciated in *Fresno Mobile Radio*, because they would be the first awarded for these frequencies, and the nationwide assignment to Nextel contemplated in the "Consensus Plan" surely would confer a different set of rights than are encompassed in Nextel's current licenses. None of Nextel's current licenses gives it the right to operate nationwide, and none encompasses a wide swath of contiguous and comparatively unencumbered spectrum. Furthermore, the rights associated with Nextel's 700 MHz licenses are limited by technical restrictions that would presumably not encumber a new license in the 1.9 GHz band.

Nextel claims that "there is no reason to believe that the subject license modifications and spectrum exchanges would so enhance Nextel's facilities as to dwarf its currently authorized facilities."[34] However, as discussed above, the spectrum holdings proposed for Nextel by the "Consensus Plan" would be so significantly better than its current holdings that it is impossible to regard the change as an auction-exempt modification under the Commission's standard.[35]

Additionally, as a practical matter, there would appear to be no way to treat the assignment of spectrum to Nextel at 1.9 GHz as a simple modification of its licenses in the 700, 800 and 900 MHz bands. The spectrum proposed for relinquishment covers licenses that have widely varying license terms. If the Commission were to assign 10 MHz nationwide in the 1.9 GHz band to Nextel, it would have no reasoned way to apply a license term except to set a new one. In such a case, this new license cannot be regarded as anything but a new "initial" license.

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[33] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*"), at ¶ 37. Given the general shortage of CMRS spectrum, it is reasonable to expect that mutually exclusive applications would be filed if the Commission were to decide to employ competitive bidding to award licenses on newly-reallocated 1.9 GHz spectrum.

[34] Nextel Reply Comments, August 7, 2002, at 67-68.

[35] This fact cannot be argued with respect to the 4 MHz of 700 MHz Guard Band spectrum that Nextel is offering to relinquish. Indeed, the only time that this spectrum has been put to use was when, in connection with the 2002 Olympic Winter Games, Nextel authorized the use of its Salt Lake City license (Call Sign WPRR291) for the limited purpose of wireless microphone and wireless intercom systems from January 28, 2002 through March 1, 2002 within 100 kilometers of Salt Lake City, Utah. *See* Nextel 700 Guard Band Corporation, Annual Guard Band Manager Report, filed with the Commission on March 3, 2003.

IV. The Commission's Authority Under Section 316 Does Not Trump Its Obligations Under Section 309(j).

With limited exceptions not applicable here, Section 309(j) of the Communications Act requires that initial licenses and construction permits be granted through a system of competitive bidding.[36] The law further requires that:

> In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission . . . shall seek to promote . . . the following objectives:
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> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."[37]

Nextel seeks to convince the Commission that it can assign 10 MHz of prime commercial wireless spectrum without competitive bidding by exercising its Section 316 authority to modify Nextel's licenses. At its essence, Nextel is asking the Commission to use Section 316 to trump 309(j). Even if one were to assume for the sake of argument that Nextel's current licenses could be legally modified in the manner suggested, such an action would violate the Commission's obligations under Section 309(j).

The Commission may not read its Section 316 authority in such a way as to violate Section 309(j). It is hornbook law that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake of error."[38]

The Section 309(j) objectives which the Commission must by law promote are clear, and they include avoiding unjust enrichment through the methods employed to award uses of the public spectrum resource. As shown above, the value of Nextel's spectrum holdings would be greatly enhanced if the Commission were to assign the 1.9 GHz spectrum to Nextel without requiring an auction. Other measures have been proposed to solve the public safety interference problem without providing additional valuable spectrum to Nextel. The Commission therefore

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[36] 47 U.S.C. § 309(j)(1). Congress provided exemptions from the competitive bidding requirement for licenses for public safety radio services, digital television service given to existing licensees to replace analog television service licenses, and non-commercial broadcast stations (*see* 47 U.S.C. § 309(j)(2)) and for licenses on spectrum used for satellite services (*see* 47 U.S.C. § 765(f)).

[37] 47 U.S.C. § 309(j)(3)(C).

[38] Sutherland, *Statutory Construction*, § 46.06 (2000); *accord, FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000); *Gustafson* v. *Alloyd Co.,* 513 U.S. 561, 569 (1995); *Davis* v. *Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989); and *FTC* v. *Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959).

can and must avoid exercising its authority to modify licenses in a manner that would violate Section 309(j).[39]

The "Consensus Plan" proposes that the Commission exempt the 1910-1915 MHz and 1990-1995 MHz bands from its normal policy of awarding spectrum licenses to the bidders who value them most highly in a competitive auction. However, the Commission is not legally empowered to essentially sidestep its Section 309(j) obligations and "establish the licensee itself by rule."[40] This is precisely what the "Consensus Plan" suggests that the Commission do.

Given the competitiveness of previous auctions for commercial wireless spectrum and the high level of interest in the reallocated MSS spectrum expressed throughout the proceeding by the commercial wireless industry, it is reasonable to assume that mutually exclusive applications would be filed when licenses for that spectrum are made available at auction.[41] The same will be true of the 1910-1915 MHz spectrum if the Commission decides to re-designate that band from unlicensed PCS to advanced wireless services. Awarding licenses for these bands through competitive bidding would fulfill Section 309(j)'s mandate to the Commission. Using its authority under Section 316 to allow Nextel to acquire this spectrum without having to pay for it would violate that mandate.[42]

Nextel's argument that the Commission can assign spectrum to it under Section 316 relies heavily on two previous actions in which the Commission exercised its Section 316 authority: (1) the relocation of Digital Electronic Message Service ("DEMS") licensees to the 24 GHz band,[43] and (2) the order allowing the Mobile Satellite Service ("MSS") licensee in the L-

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[39] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); *Murphy Exploration v. U.S. Dept. of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001) ("[W]hen construing a statute we are obliged to give effect, if possible, to every word Congress used."); *Mail Order Ass'n of America v. U.S. Postal Service*, 986 F.2d 509 (D.C. Cir. 1993) (same).

[40] *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 451 (D.C. Cir. 1991).

[41] Now that the 1990-2000 MHz band has been reallocated from satellite use, it is no longer exempt from competitive bidding under 47 U.S.C. §765(f). Furthermore, the Commission's obligation under Section 309(j)(6)(E) to avoid mutual exclusivity does not serve as a basis for limiting competition for the right to use the 1.9 GHz spectrum. The Commission has rejected efforts to use Section 309(j)(6)(E) to gain a windfall by limiting eligibility for new geographic area licenses in the 800 MHz SMR bands. *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, *Second Report and Order*, 12 FCC Rcd 19079 (1997), at ¶ 62. The Commission should follow the same logic here, as Nextel seeks to avoid competition for newly-reallocated 1.9 GHz spectrum.

[42] As the Commission determined in the context of pioneer's preference licensing, "we fail to advance Congress's objective, set out in Section 309(j)(3)(C) of the Act, of 'avoidance of unjust enrichment' if we award pioneer's preference licenses to these applicants for free." *Review of the Pioneer's Preference Rules and Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4055 (1994), at ¶ 13.

[43] *See Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, ET Docket No. 97-

Band to have access to additional L-Band Spectrum.[44] Neither of these actions, however, lends any support to the notion advanced by Nextel that the Commission can simply avoid its obligations under Section 309(j) by asserting its authority under Section 316.

The DEMS case is easily distinguishable from the circumstances here. There, the spectrum in the 24 GHz band to which DEMS licensees were moved was federal government spectrum that was made available by the National Telecommunications and Information Administration expressly for the purpose of relocating DEMS licensees so as to protect military satellite systems.[45] Because that spectrum would not otherwise have been available for licensing under Section 309(j) competitive bidding, the Commission did not face the prospect that its relocation action would violate Section 309(j). In contrast, the 1910-1915/1990-1995 MHz spectrum bands at issue here are already allocated for commercial services and the Commission has indicated the desirability of using these bands for advanced wireless services. In these circumstances, the Commission cannot sidestep Section 309(j) and award these bands to Nextel without an auction.

Likewise, the "Consensus Plan's" proposed spectrum upgrade for Nextel is very different from the circumstances that gave rise to the Commission's decision in the MSS L-Band proceeding. There, the Commission modified the license of the sole L-Band licensee so that it could operate on a lower portion of the L-Band, for which it had not previously been licensed. In so doing, however, the Commission specifically stated that the Section 309 licensing rights of other parties were not at issue because it had never proposed "to open this spectrum for competing applications and we have not done so."[46] Unlike the L-Band proceeding, the reallocation of spectrum in the 1.9 GHz band for advanced wireless services has been premised upon the need for more commercial wireless spectrum, which Section 309(j) obligates the Commission to award through competitive bidding.

In both these cases, the Commission and the incumbent licensee were faced with circumstances outside their control that precluded effective deployment: incumbent government/military spectrum use (DEMS); and international coordination problems (L-Band). In this case, Nextel has not been precluded from deploying service on its existing spectrum, and it has not shown that it needs 10 MHz of contiguous spectrum in the 1.9 GHz band to do so.

Nextel's attempt to be exempt from having to compete for newly-reallocated spectrum in the 1.9 GHz band should be rejected for the same reasons given by Chairman Powell and Commissioner Abernathy in the Northpoint decision:

> the statute does not support exempting this spectrum from auction nor does it grant Northpoint the exclusive privilege it seeks. We also do not believe other licensing distribution mechanisms that avoid mutual

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99, Order, 12 FCC Rcd 4990 (1997), *recon. denied*, 13 FCC Rcd 15147 (1998) ("*DEMS Relocation Recon Order*"), at ¶ 11.

[44] *See Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band*, IB Docket No. 96-132, *Report and Order*, FCC 02-24 (rel. February 7, 2002) ("*MSS L-Band Order*").

[45] *See DEMS Relocation Recon Order* at ¶ 11.

[46] *MSS L-Band Order* at ¶ 27.

> exclusivity are appropriate for this service. While we understand the equitable basis for Northpoint's claims, we cannot support that equitable concern trumping the auction regime Congress created in the statute, or the value of allowing other competitors to vie for a chance to offer service to the public.[47]

The Commission may not exercise its Section 316 authority in a manner that would violate Section 309(j). Thus, it must reject the notion that it can simply "modify" Nextel's licenses to specify operation at 1910-1915/1990-1995 MHz.

CONCLUSION

Nextel claims that restructuring the 800 MHz band would benefit public safety entities by mitigating the interference to their systems - interference that is caused largely by Nextel's SMR operations. However, Nextel also would stand to benefit from an 800 MHz band restructuring by gaining more contiguous spectrum holdings in that band.[48] Moreover, the "Consensus Plan" proposes that Nextel return to the Commission largely non-contiguous spectrum, most of which is non-nationwide and ill-suited for broadband commercial wireless services because of incumbent uses or technical restrictions, or both. In return, Nextel would receive, without having to compete in an auction, 10 MHz of essentially clear, nationwide spectrum. In this respect, the "Consensus Plan" must be seen for what it is: a vehicle for Nextel to improve its position as a competitor in the commercial wireless market.

The "Consensus Plan" cannot be justified legally either as a "channel swap" or as a "license modification." Adopting such a plan would violate well-established spectrum policies underlying Section 309(j) of the Communications Act and would circumvent the Commission's standard license assignment process. The Commission cannot ignore its statutory obligations under Section 309(j) and cannot legally use its Section 316 authority to "trump" these obligations. The Commission must reject the "Consensus Plan."

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[47] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614 (2002) (Joint Statement of Chairman Michael Powell and Commissioner Kathleen Q. Abernathy).

[48] Even if the Commission were only to realign the 800 MHz band, the contiguous spectrum that Nextel would receive in the process would have a value that far exceeds the amount ($850 million) it has pledged to facilitate realignment.